

Trade, Competition & Multilateral Competition Policy

Executive Summary

The interaction between international trade and competition is increasing at a rapid rate in today's globalising world. Where, on the one hand, multilateral trade rules affect competition in domestic market, domestic competition policy/law affects the flow of goods and services across the border, on the other. This interface between trade and competition raises various political, economic, legal and institutional issues. One of the outcomes of such an interface has been the internationalisation of competition policy, such as various bilateral cooperation agreements. This in turn has given rise to a debate on a multilateral competition arrangement. The issues relating to a multilateral arrangement on competition rules encompass several important and varied facets, which form the core of current debates at various fora – domestic, regional as well as international.

This briefing paper is divided into three sections. The first section: "Trade & Competition Policy" explores the interaction between trade and competition policy. The second section: "Competition and WTO" explains and deals with the status of competition policy issues at the World Trade Organisation. The last section: "Whither Multilateral Competition Policy" explores the current debate vis-à-vis multilateral arrangement on competition policy.

Section I clearly shows that there is a fair amount of interaction between trade and competition policy. It specifically exhibits the interface in four areas: market access for imports; market power in export markets; foreign investment; and intellectual property rights.

After exploring the interface between trade and competition policy, the Paper, in its Section II, provides historical background of the efforts undertaken to bring competition rules into the multilateral trading system. The starting point being the post-World War II effort to adopt the Havana Charter. It further highlights the elements of competition policy that are present in various agreements under the WTO acquis. Finally in this section the Paper speaks, albeit briefly, on the status at the WTO Working Group on the Interaction between Trade and Competition Policy. It concludes that 'competition' is not a new issue at the WTO, though the same may not be systemic.

In its last section i.e. Section III, the Paper carries on the debate with respect to multilateralisation of binding competition rules and highlights the issues that are on the table for further discussions. It also deals with the existing and probable hurdles against the efforts towards a multilateral arrangement. Briefly touching upon the feasibility of such an arrangement under the WTO umbrella, the Paper highlights the possibility of multilateral arrangement on competition outside the WTO, as is being suggested by some academicians and now being advocated by the United States.

Steering away from any firm conclusions, the Paper ends with the recommendation that some sort of multilateral regime to regulate competition concerns is needed, as in the current globalising world, unilateral efforts may not be enough to tackle all types of restrictive business practices (RBPs). The Paper stresses that for any kind of multilateral framework on competition, the agenda must come from the South.

BRIEFING PAPER

कट्स  **CUTS**
CENTRE FOR
INTERNATIONAL TRADE,
ECONOMICS & ENVIRONMENT

Introduction

The whole process of trade liberalisation under the General Agreement on Tariffs and Trade (GATT) since 1947, resulting in the establishment of the World Trade Organisation in 1995, is about the contestability of markets. This means the ability of firms of one country to be able to sell goods and services to firms or consumers of another country, if the quality, prices etc are acceptable to the buyers, and that the transaction does not violate any public policy. This arrangement has been protected under the WTO acquis, which has been designed to ensure a fair market access to all its members into the markets of other members without any discrimination and dispute settlement in case of violation of such a right.

The WTO is a bundle of agreements on several goods and services, with various rules on how they are produced and traded, ensuring that there is a healthy competition in the global market place. Through its political committees and dispute settlement system, the WTO also regulates the same as a competition regulator in the global marketplace. However, this is not enough, and therefore the demand for competition rules to be integrated in the international trading system.

Historically, competition and international trade laws have evolved in a different context, have had different scope of application and different goals to achieve. Competition law has evolved in a national context in order to regulate the economic activity within the country by protecting business and consumers against abuses of economic power and promoting efficiency and consumer welfare. International trade, by contrast, operates in an international context and focuses on liberalising governmental measures which restrict market access either through border regulations, internal regulations or through government participation in trade.

That said, the interaction between trade and competition has, of late, become a common phenomenon

in the globalised world. Where, on one side, multilateral trade rules affect competition (for instance due to antidumping and intellectual property rules), on the other, domestic competition issues affect international trade (e.g. Kodak-Fuji case). However, this interface is very complex and raises various political, economical, legal and institutional issues.

In order to address such a linkage, the WTO at its first Ministerial Conference in 1996, at Singapore, *inter alia* decided to establish a Working Group (WG) to study the interaction between trade and competition policy. Discussions of this nature are also taking place at the United Nations Conference on Trade and Development (UNCTAD) since the 1980s, and the WTO-WG is to give due consideration to the studies carried out by the former.

Incidentally, the decision to establish a working group on trade and competition policy is part of the built-in agenda under the Agreement on Trade-Related Investment Measures (TRIMs). The same clause in the TRIMs also requires that the relationship between trade and investment be examined. After such an examination, the clause calls for appropriate recommendations on whether the TRIMs agreement be complemented with provisions on investment policy and competition policy. This is the subject of another working group set up simultaneously at the Singapore ministerial meeting. Since competition and investment are closely linked, the two working groups have also been asked to call upon each other's work.

However, nothing substantial has come out of the WTO-WG on the interaction between trade and competition policy, mainly because countries are still trying to understand the complexities of the issue. This Paper, in its various sections, discusses the issues relating to trade, competition and multilateral arrangements and tries to simplify the complexities involved in the same.

Box 1: The Kodak-Fuji Case: Distribution System of Photographic Film & Paper in Japan

In May 1995, Kodak filed a '301 case' with the US Government complaining that Fuji in Japan was restricting Kodak's access to the Japanese market for photographic film and paper.

The allegations by Kodak focus on Fuji's exclusive distribution agreement with retail stores in Japan, maintenance of resale prices, as well as Fuji's practice to enforce those contracts. It is claimed that since Fuji has a dominant position in Japan with a market share of 75%, Fuji precludes Kodak from selling via the regular retail system in Japan. This allows Fuji to maintain high prices in Japan and block rivals from access to the distribution channels, while dumping its products in foreign markets through cross-subsidisation. As a result, Kodak's market share in Japan

could not exceed 7%, although in most foreign markets its share is around 40%.

Kodak's complaint emphasises the fact that Fuji's business practices violate even the Japanese anti-trust law and this was tolerated by the Japanese Government. More so, the Japanese Fair Trading Practices Commission did not find that Fuji had violated the Japanese antimonopoly laws. However, in response Fuji denied Kodak's allegations and, instead, claimed that Kodak used restrictive business practices in the US market, such as exclusive agreements and tying, to foreclose foreign competitors, which prevented Fuji from attaining a market share above 10% in the US.

In June 1996, the US requested for consultations with Japan under the Dispute Settlement

Understanding concerning Japan's laws, regulations and requirements affecting the distribution and sale of imported consumer photographic film and paper. In September 1996, the US requested the establishment of a panel, alleging that a number of Japanese government measures relating to, *inter alia*, distribution and business practices were inconsistent with Article III (national treatment) and Article X (transparency) of the GATT. The US also made a claim of "non-violation", nullification and impairment. The panel was established in December 1996.

Finally, in March 1998, the WTO Panel rejected the US claims against the Government of Japan.

Source: Khemani and Schone, International Competition Conflict Resolution (1998); and WTO Annual Report for 1997

SECTION I: TRADE & COMPETITION POLICY

There are number of areas where enterprise behaviour could give rise to problems in international trade relations and the responses of governments to such behaviour. At least four areas are crucial in this context. These are:

- Market access for imports;
- Market power in export markets;
- Foreign investment; and
- Intellectual property rights.

Market access for imports

Trade concerns have arisen in past where vertical market restraints (arrangements that link firms at successive levels of product distribution chain) have prevented foreign firms from having access into the market. For instance, by making it difficult for the foreign firms to access the distribution network that is controlled by domestic suppliers. The dispute between the US and Japan relating to consumer photographic film and paper (i.e. Kodak-Fuji case) explains it better. (See Box 1)

Other vertical restraint practices include; exclusive dealing requirements, tied selling, loyalty or sales rebates, exclusive territories, distributor boycotts etc.

Though, in general, competition laws are capable of tackling such restraints, in practice they may not do it, as foreign producers' interests are involved at the cost of domestic producers. On technical grounds also it may be difficult to get relief in such cases.

Secondly, import cartels formed by domestic buyers are also a matter of concern with respect to the market access issue. The issue under international trade relations is that enforcement of competition laws by the importing countries is not effective with respect to such cartels. Thirdly, state trading enterprises and enterprises with special rights and monopolies can also have an adverse impact on market access for imports.

Market power in export markets

There are several tools which are used to exercise market power in export market, such as export cartels; international cartels; mergers & acquisitions (M&As); abuses of dominant position; predatory pricing; price discrimination; cross subsidisation and dumping.

Export cartels, in general, are outside the realm of competition law (in contrast often these are state sponsored). This policy is principally concerned with the domestic producer's welfare. However, in the globalised world, with increasing recognition of the mutual interdependence of economies, exemptions of export cartels can also be viewed as a "beggar-thy-neighbour" policy.

Another issue, which is gaining momentum in international trade relations, arises from attempts on part of enterprises to exert market power, whether through collective action (international cartels, joint ventures etc.) or through acquiring dominant position via the M&A route and its possible abuse. Though domestic competition laws have jurisdiction to deal with such practices, its enforcement remains a problem. Similar is the case with M&As.

Box 2: Parallel Imports – Emerging as a Major Issue

Parallel imports are goods manufactured outside the jurisdiction by or under the authority of the IPR owner but which are subsequently imported into another country (possibly back into the country of origin) by someone other than an authorised importer or distributor. Unlike pirated goods or copies, parallel imports involve legitimate products.

Parallel imports increase the product range in a market, and hence enhance competition. As enterprises' behaviour tend to monopolise, parallel imports are generally contested by the concerned IPR owner. On the other hand, a competition authority may allow it to enhance competition in the market. Due to globalisation, the instances of parallel imports have increased manifold and hence instances of such contests are also increasing. Governments also may lock their horns, if producers' interest of one country is suffering significantly.

For instance, when New Zealand lifted restrictions on parallel imports in 1998, the US threatened the former, as the same will allow importers to bring brand-name

goods without a franchise. New Zealand's decision was particularly sensitive for the US automobile, pharmaceutical and compact disc manufacturers. On the other hand consumer groups, importers and retailers of New Zealand welcomed the move.

Quite interestingly, the US Supreme Court in one case ruled that US copyright laws do not prohibit parallel imports into the US. The court held that once a US company sells a copyrighted product abroad, it loses its right to control the distribution. Even though the product may have been intended for sale somewhere else in the world at a lower price, it can be imported back for sale in the US.

In contrast, the European Court of Justice in the 'Silhouette' case, 1998 ruled that parallel imports broke trademark laws. However, a year later, the English High Court ruled that it was still possible for trademarked goods to be bought outside the European Economic Area and then resold inside the area against the manufacturer's wish. Thus this ruling limits the effect of 'Silhouette' case.

The High Court held, "Silhouette [case] has bestowed on a trademark owner a parasitic right to interfere with the distribution of goods which bears little or no relationship to the proper function of the trademark right".

This reference came about in a case concerning Davidoff, the maker of cigars and perfumes, which tried to sue parallel trader A&G Imports for trademark infringement for importing some of its products from Singapore. However, the legal issue is yet to be resolved as the matter is pending final resolution at the European Court, where the English High Court referred the matter for a final decision.

Most importantly, the TRIPs Agreement does not disallow parallel imports. According to Article 6 of the Agreement, "nothing in this Agreement shall be used to address the issue of the exhaustion of IPRs for the purpose of dispute settlement under the Agreement". Exhaustion of IPRs means that once the rights-owner or the authorised person releases the protected products in the market, its IPRs are considered to be exhausted.

Source: *Financial Times*, 19.09.1999; *Economiquity*, No. 6, April-July 1998

Furthermore, enterprise practices that involve pricing in export market like predatory pricing, dumping, cross-subsidisation, etc. also have effects on competition and hence a controversial area of interaction between trade and competition policy. In this regard, the increasing trend of imposition of antidumping duties is a major competition concern and an issue of debate world over.

Foreign investment

The importance of foreign direct investment is increasing at a very rapid pace, due to two complementary factors. First, the increasing reliance on FDI by producers to enter, establish and supply foreign markets (the push factor). Secondly, increasing reliance on FDI as an engine of growth by the host countries (the pull factor). Consequently, 'investment' is getting increasingly integrated with trade. A component of the relationship between foreign investment and competition policy is the important role latter can play in removing barriers to market entry for foreign investors.

In the post-establishment phase, competition law provides necessary safeguard against arbitrary decision-making, apart from dealing with anti-competitive business practices by such investors. Investment through the M&A route is another area where there is significant interaction between investment and competition policy. This issue is gaining more and more momentum in light of increasing trend in M&As world over, particularly since mid-1990s. (*Also see 'M&As with international spillovers' in Section III*).

Intellectual property rights

Anti-competitive practices in connection with IPRs have been an important issue in international economic relations since long. After the inception of the WTO TRIPs Agreement the issue has acquired a more specific trade dimension.

One of the concerns, expressed mainly by developing countries, during the negotiation of the TRIPs Agreement was that commitments to protect intellectual property should be balanced by recognition of the rights of Members to prevent anti-competitive practices involving the use of IPRs. And that there should be international cooperation to facilitate such prevention, especially for the countries with limited resources. These concerns are reflected in Articles 8 and 40 of the TRIPs Agreement.

Anti-competitive practices involving the use of IPRs could take the form of horizontal restraints or vertical restraints. For instance, intellectual property licensing agreements among competitors, such as patent pooling, serve as vehicles for establishing cartels to fix price/allocate market/limit output etc. For example in 1994, Pilkington continued to enforce the license agreements, restricting the territories of its licensed competitors and use of patent, even after the patent right had expired.

Further, IPRs can also be a factor in monopolisation or abuse of a dominant position case. Furthermore, another area where IPRs and competition policy have an interface is with respect to parallel imports. Parallel import is becoming a hot and complex issue in international trade relations. (*See Box 2*)

From the above discussion it is clear that there is significant amount of interaction between international

Box 3: Work Programme of the WTO Working Group on the Interaction between Trade and Competition Policy: The Checklist of Issues Suggested for Study

Item I: Relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy. Their relationship to development and economic growth.

Item II: Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including experience with their application:

- national competition policies, laws and instruments as they relate to trade;
- existing WTO provisions;
- bilateral, regional, plurilateral and multilateral agreements and initiatives.

Item III: Interaction between trade and competition policy:

- the impact of anti-competitive practices of enterprises and associations on international trade;
- the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade;
- the relationship between the trade-related aspects of intellectual property rights and competition policy;
- the relationship between investment and competition policy;
- the impact of trade policy on competition.

Item IV: Identification of any areas that may merit further consideration in the WTO framework

Source: WTO

trade and competition policy. More importantly, such interaction is on a rising trend. This has resulted in internationalisation of competition policy. These developments, in turn, have given rise to a debate on multilateralisation of competition rules. One such debate is vigorously going on at the WTO platform.

SECTION II: COMPETITION AND THE WTO

Historical background

After World War II, the first effort for an arrangement to monitor international trade was the Havana Charter, which called for the setting up of the International Trade Organisation. Though over 50 countries adopted the Charter, the ITO never came into existence. The General Agreement on Tariffs and Trade (GATT), which was agreed upon by the international community later on, was however largely based on the Havana Charter. Importantly, a whole chapter (i.e. Chapter V, titled "Restrictive Business Practices") in the Charter was devoted to curb RBPs with respect to international trade.

Later on, when it became obvious that the Havana Charter would not enter into force, the Contracting Parties held a review session in 1954-55 to examine the desirable extent to amend or supplement the GATT. However, further consideration of the matter was postponed. In 1958, the Contracting Parties decided to appoint a Group of Experts to study and make recommendations *inter alia* with regard to whether and to what extent they should undertake to address the issue of RBPs in international trade.

Box 4: The Vitamin Saga

One of the recent anti-competitive activities unveiled by the US anti-trust authorities involved several leading and sophisticated drug manufacturers of the world. These include Swiss pharmaceutical companies Hoffmann-La Roche and Lonza AG; BASF, Degussa Huls AG and Merck KGAA of Germany; Rhone Poulenc of France; Nepera Inc. and Reilly Industries Inc. of the USA; Daiichi Pharmaceutical Co. and Eisai Co. Ltd. of Japan etc.

These companies led a global conspiracy to fix prices of vitamins, allocate markets, supply contracts and sales volume, apart from bid-rigging at various times, which according to the US antitrust officials, have affected more than US\$5bn of commerce in such products. According to the US investigators the colluding companies acted as if they were working for the same company, referred to by the cartel executives as 'Vitamin Inc.'

Majority of the colluding firms have admitted their involvement in the cartel that continued for nine years from 1990 to 1999 and agreed to pay fines. For instance, Roche agreed to pay US\$500mn, the largest criminal fine in the US, while a former executive of Roche agreed to be jailed for four months in the US. On the other hand, Rhone-Poulenc escaped punishment and supplied much of the evidence. Apart from the above, these companies were also subjected to private civil suits for damages suffered by their customers, which they agreed to settle out of court

Furthermore, in Canada, five international companies have been slapped with fines totaling C\$88.4mn. Most recently, in December 2000, units of three European companies agreed to total penalties of A\$26mn in a case brought by the Australian Competition & Consumer Commission for alleged price fixing and market sharing. This is in addition to the ongoing investigations of worldwide vitamin industry in which there have been 24 prosecutions till May 2000. According to one estimate, the total criminal fine against such corporate defendants has been over US\$875mn. Furthermore, eleven foreign executives have been convicted till April 2000.

Though the products involved in the conspiracy are intermediary products and its customers are mainly businesses, ranging from drug manufacturers to those involved in food or milk business, the costs of production would definitely have been passed on to consumers, who have ended up paying more than what was required. One is not aware if the US customers (i.e. businesses) of the Vitamins Inc have passed on the benefit of the damages, they received from their suits against the Vitamins Inc., to their consumers. In an arrangement in the US, out of US\$225mn, being recovered by 23 States jointly, about US\$107mn will go to charities because it is impossible to identify the final purchasers. Another US\$107mn will go to wholesalers and distributors. The remainder will be used to supplement the funds as necessary.

Similar issue remains unresolved for consumers in the developing world, notwithstanding the rip off suffered by the suppliers of the finished goods. These suppliers are again either domestic enterprises or subsidiaries of the same foreign enterprises, which have or could have claimed damages. International cooperation on such issues is evident to ensure that global commercial crimes are not only checked in some countries, but in all the affected countries.

Source: DOJ/Antitrust: Speech, April 12, 2000; Business Standard 29.07.99; Financial Times, 21.09.99; Business Line 29.03.00; 06.05.00; 23.09.99; 11.10.00; 05.12.00

On the basis of the report by the Group, in 1960, the member states adopted a Decision on Arrangements for Consultations on Restrictive Business Practices. The Decision recommends that: at the request of any Contracting Parties, a Contracting Party should enter into consultations on harmful RBPs in international trade on bilateral or multilateral basis as may be appropriate. Till now, these arrangements have been invoked on only three occasions, all during 1996, in regard to business practices affecting consumer photographic film and paper (between the US and Japan).

The issues pertaining to RBPs and possibilities of measures to deal with the same was then raised in the preparatory work for the Uruguay Round negotiations. However, no consensus was reached during the Round. But one can say that these continuous efforts culminated into the incorporation of competition principles in different agreements of the WTO acquis.

Competition-related provisions in existing WTO Agreements

The General Agreement on Trade in Services (GATS): Article VIII of GATS obliges Members to ensure that any monopoly supplier of a service does not act in a manner inconsistent with Members' obligations and commitments and Article IX says that Members recognise that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services. These provisions, related to competition policy, are based on positive comity. They provide for consultation among members and the enforcement is by means of national laws and regulations.

Agreement on Trade-Related Aspects of Intellectual

Property Rights (TRIPs): Article 8.2 of TRIPs allows a Member to take appropriate measures in order to prevent the abuse of IPRs by the right holders or the practices, which unreasonably restrain trade. Article 40 of TRIPs authorises Members to specify in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market. Article 31 of TRIPs Agreement recognises anti-competitive practices as one of the grounds for 'use without authorisation of the right holder' i.e. compulsory licensing.

Agreement on Trade-Related Investment Measures (TRIMs): Article 9 of TRIMs Agreement mandates the Council for Trade in Goods to consider whether the Agreement (i.e. TRIMs) should be complemented with provisions on investment policy and competition policy.

Agreement on Safeguards: Article 11.3 of the Agreement on Safeguards obliges Members not to encourage/support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements or other governmental arrangements prohibited under the Agreement.

GATT 1994: Article XVII of GATT 1994 concerns state trading enterprises and other enterprises which benefit, formally or in effect, from exclusive or special privileges. In Para 3 of the Article, the Members recognise that enterprises of this kind might be operated so as to create a serious obstacle to trade. The Para further recognises that negotiations on a reciprocal and mutually advantageous basis, designed to reduce such obstacles, are important to the expansion of international trade.

Others: Shades of competition policy are also found in Agreement on Technical Barriers to Trade, Agreement

on the Application of Sanitary and Phytosanitary Measures, Agreement on Preshipment Inspection, Agreement on Government Procurement (1994) and Agreement on Trade in Civil Aircraft. Furthermore, in the Trade Policy Review Mechanism, established in Annex 3 of the WTO Agreement (and which provides a broad mandate for multilateral surveillance of Members' trade policies and practices), competition issues are frequently raised in terms of their effects on a Member's imports or exports of goods and services.

Thus it can be said in the light of the above discussions that competition is not a "new" issue at WTO. However, it is also true that the same has not yet systematically developed into anything substantial.

Working Group on Interaction between Trade and Competition Policy

The Working Group on Interaction between Trade and Competition Policy (herein after the Working Group) was established by a decision taken at the WTO Ministerial Conference held at Singapore in December 1996, with a view to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.

At its first meeting held on 24th April 1997, the General Council appointed Prof. Frederic Jenny, vice-chairman of the French Competition Council, as the Chairman of the Working Group. The Chairman, in his non-paper, spelt out a checklist of issues to be studied and discussed in the Working Group (See Box 3). The non-paper also notes that discussions, on the basis of which this checklist has been prepared, have emphasised that all elements should be permeated by the development dimension and that particular attention should be paid to the situation of least-developed countries.

SECTION III: WHITHER MULTILATERAL COMPETITION POLICY?

As time is passing, the debate on the motion: "whether there should be a separate agreement or arrangement on competition rules incorporated into the multilateral trading system" is getting hotter. The debate is contentious and often muddled without any consensus emerging on the 'whether' and 'how'. For instance, one school is in favour of the international arrangement being set up on an urgent basis while the other school cautions that the same should incorporate the development dimensions. This means more study and country-specific research is required, and hence more time needs to be devoted.

The European Union is the most vocal protagonist for multilateral rules on competition under the WTO, being backed by Japan. Interestingly the US, which was the force behind the incorporation of the provisions for the control of RBPs in the Havana Charter in 1947 and has demanded international action in this area in past (witness US vs. Japan on disputes relating to consumer photographic film and paper), is now against multilateral competition rules under the WTO. However, in a very recent development, the US has come forward with a proposal for a multilateral competition body outside the WTO system.

That said, the main arguments for binding multilateral competition rules that are cropping up from debates and discussions at different fora can be summarised as follows:

1. *Market Access*: As discussed in Section I above, trade concerns have arisen in the past due to domestic anti-competitive activities like import cartels or certain kinds of vertical restraints. It is argued that these negate the basic objective of free trade as envisaged by the Uruguay Round outcome. Rich countries generally adopt this view and this is why they want a multilateral arrangement on competition.
2. *International Cartels*: According to one estimate, around 20 international cartels are operating at the international level. Being international in character, it is very hard to detect and break these cartels by invoking domestic competition laws, though majority of such laws has jurisdiction to deal with the same. It is argued that an international watchdog with appropriate mandate could be the way forward to deal with cartels. The recent vitamin cartel case throws light on the gravity of the effect due to international cartelisation. (See Box 4)
3. *M&As with international spillovers*: When there is a merger between two or more worldwide dominant firms in global market, competition concern may arise in all the markets where these firms conduct business and the effects of possible dominance may occur in all these countries. Similarly, the regulation of such merger has international spillovers, as different regimes view mergers with different approaches and also gives rise to multiplicity of jurisdiction according to the "effects doctrine". This again is one of the main issues in international economic relations and is being pushed forward as one of the principal arguments for a multilateral arrangement. For instance, the Gillette–Wilkinson merger had to be cleared by 14 separate competition authorities. Boeing-McDonnell Douglas merger proposal saw a greater deal of interaction between the competition authorities of EU and US. (see box 5)
4. *Export cartels*: Last but not the least, there are certain anticompetitive practices that are not covered by

Box 5: The Boeing-McDonnell Douglas Merger

In 1997, Boeing Co. proposed to merge with McDonnell Douglas, which would have brought together the two major US-based players in the international civil aircraft industry, leaving only one other competitor – the Europe-based Airbus Industrie consortium. The US and EC competition authorities, having different legal approaches to the merger, initially had divergent views as to the desirability of allowing the merger to proceed.

While the US approved the merger, it received negative reaction from the EU. The US antitrust officials were of the view that McDonnell Douglas' absorption by Boeing would not adversely affect the state of competition in the industry.

The EU ultimately cleared the merger when Boeing agreed to make concessions relating to long term exclusive purchase contracts it had previously negotiated with major airline customers and licensing of patents to other jet aircraft manufacturers. The EU also indicated it would strictly monitor Boeing's compliance with these commitments.

Source: Pitsky et al. (1997); Khemani and Schone, *International Competition Conflict Resolution* (1998)

domestic competition laws. In contrast, governments generally support such activities. For instance export cartels or cross subsidisation policies. These beggar-thy-neighbour policies distort competition in world trade and are against interest of consumers. Even the widest of the bilateral 'cooperation agreements' (i.e. between the US and the EU) do not deal with these kinds of issue. These can be streamlined only by an international agency.

But what stops a multilateral arrangement on competition rules. Following could be some of the reasons:

1. The most crucial reason is the skepticism of the South, which is mainly because of their unsatisfactory experience with the functioning of the present multilateral trading system under the WTO. The South is skeptic also because they think that under a competition regime, 'big' transnational corporations will dominate their economies due to their huge market power. In that process, the TNCs, it is apprehended, will also takeover their national firms, and thus capture their economies.
2. Many countries, including the USA, have reservations about the application of WTO Dispute Settlement Mechanism vis-à-vis competition rules. There is widespread recognition that WTO-DSM is not well suited to the review of decisions taken in individual cases because of the intensive nature of such [competition] cases. Competition decisions are often judicial decisions and making them subject to the WTO-DSM raises obvious questions about national sovereignty (Jenny, 2000).
3. Developing countries feel that any more obligations at the multilateral level means more expenditure in their national budgets to meet such obligations. They think the costs of adopting such measures may turn out to be larger than the expected benefit. Thus it is a question of costs and benefits.
4. Many believe that the problems, for which a multilateral arrangement is required, can be solved by developing bilateral and plurilateral cooperation agreements. It is true that such agreements are very helpful, but there are inherent limitations with such arrangements. On the one hand, it may be difficult for a developing country to reach such an agreement with developed countries because of the lack of a *quid pro quo* in this regard. On the other, even if such an arrangement is arrived at, it may not be sufficient to provide solutions to every problem.
5. The fact that the US is not in favour of a multilateral competition agreement under WTO (or rather opposing the same) could be a factor against the possibility of reaching an optimal political equation required for consensus on the issue.
6. Last, but not the least, as pointed out by Peter Holmes and Bernard Hoekman, there are powerful lobbies that support the maintenance of antidumping. They may oppose any effort to reach at multilateral competition rules, as it is said that such an arrangement could prove successful in disciplining the vigorous use of antidumping provisions.

Some academicians like Eleanor Fox, Graham and Richardson etc. are advocating for a multilateral competition regime outside the WTO. According to Fox, trade protects competitors while competition law protects

consumers and hence marriage (between the two) is likely to turn competition law into a producer-protecting instrument. Instead she proposes for a free standing "World Competition Forum".

Very recently, the US has set out a proposal of creating a world competition authority totally independent of existing institutions, including the WTO. In the words of Joel Klein, responsible for the antitrust division of the American Department of Justice, "the phenomenon of globalisation and the unprecedented proliferation of transnational transactions calls for establishment of an authority to supervise, co-ordinate and simplify the various procedures that are presently necessary to ensure the fairness of the competitive game". He further indicated that the WTO could play a part in the development of the world authority and contribute towards the management of this project, along side the OECD and the World Bank.

In conclusion to this section it can be said that though there is no consensus on the mode, mechanism and structure of a multilateral arrangement on competition, a consensus is however emerging that domestic competition policy *per se* is inadequate to deal with anticompetitive conduct of businesses in the globalised world. As far as remedies against competition abuses in international trade are concerned, *Table 1* can give a good insight.

Conclusion

In conclusion, it can be said quite reasonably that some form of international arrangement to deal with cross border competition abuses is highly necessary. While the Southern skepticism is justified to some extent, without such a mechanism it is they who will suffer more. One may perceive a Catch 22 situation on the part of developing world vis-à-vis a competition agreement under the WTO umbrella. But there is no doubt about having an effective competition policy and law at domestic level. In fact to optimise the benefits out of liberalised and globalised economy, it is a must.

As most of the developing countries have now liberalised their economy, the next step they should take is to come up with a suitable competition regime. This can be done by consulting other developing countries, which have some experience with competition law and policy. This will enable them to go up the learning curve faster. But any opposition to it from vested interests within the country must be dealt with firmly. This opposition will continue to operate in such countries where there is no competition regime or where the proper application of the regime can be influenced. Markets cannot be left to themselves. They need to be regulated, albeit not excessively.

Furthermore, developing countries should develop cooperation agreements among themselves (bilateral and regional) and with other developed countries. Then they should group together and prepare an agenda for a multilateral competition arrangement, which will take care of their concerns in a manner that their interests are not compromised in any way. Any multilateral agreement can be a double-edged sword, and the experience gained so far will be quite helpful for crafting an agreement that will not threaten their interests.

Table 1: Remedies to Antitrust Problems in International Trade

Category	Practices	Remedies at the National Level	Complementary Measures through an Agreement at the International Level
Restriction of Market Access by Import-Competing Firms	<ul style="list-style-type: none"> · Exclusive dealership · Long-term business relationships · Vertical integration · Distributor boycotts · Abusive practices by trade associations 	Enforcement of antitrust law in the country where market access is restricted via filing of cases by affected exporters	<ul style="list-style-type: none"> · Legal standing of exporters without subsidiaries · Legal standing of private parties · Strengthen private action suits · Political independence of administrative agencies · International dispute settlement if enforcement is discriminatory
Anticompetitive Behavior by Exporters in the Importing Country	<ul style="list-style-type: none"> · Predatory pricing · Import and export restrictions for subsidiaries of MNEs · Abusive licensing of technology 	Adoption and enforcement of national antitrust laws in the importing country (effects doctrine)	<ul style="list-style-type: none"> · Abolish antidumping · International cooperation of antitrust agencies: collection of evidence and enforcement action abroad · Comity rules
Spillovers of Antitrust Regulation	<ul style="list-style-type: none"> · Mergers · Global monopolization strategies 	Enforcement of national antitrust laws; diversity of national antitrust laws	<ul style="list-style-type: none"> · International cooperation of antitrust agencies: collection of evidence and enforcement action abroad · Comity rules · Non discrimination rules · International notification, consultation, and dispute settlement · Selective procedural harmonization
Strategic Antitrust Policy	<ul style="list-style-type: none"> · Antitrust exemptions for export cartels · Exemptions for R&D joint ventures · Strategic evaluation of mergers 	Export cartels: enforcement of antitrust laws in the importing country (effects doctrine)	<ul style="list-style-type: none"> · Abolition of export cartel exemptions · Prohibition of strategic arguments in merger control · International minimum standards for R&D cooperation
Level Playing Field	Less strict antitrust rules or enforcement may give companies a competitive advantage over rivals in foreign markets	Accept different approaches in antitrust policy as the deliberate choice of a nation	Discuss convergence of national antitrust laws

Source: Khemani and Schone, *International Competition Conflict Resolution (1998)*

Recommendations

The Southern governments should:

- develop an effective domestic competition law and policy;
- develop bilateral and regional cooperation agreements on the basis of positive comity in order to deal with cross-border competition concerns;
- develop an agenda for such a multilateral framework for competition rules so that it does not undermine southern interests;
- press for mandatory cooperation in case of international

- cartels and develop a mechanism for the proportional distribution among the affected countries of the damages recovered after breakage of such cartels;
- discourage import and export cartels through cooperation agreements as well as proposed multilateral competition arrangement;
- legislate removal of restrictions on parallel imports; and
- press for an assessment of the effect of home country mergers on the host country's competition level before the former allows the same.

Comments on this paper, received from Mr. Peter Holmes, Mr. Robert Anderson and others, are gratefully acknowledged and suitably incorporated.

This Briefing Paper is produced by CUTS under a grant from the Friedrich Ebert Stiftung to inform, educate and provoke debate on issues of trade and sustainable development, and economic equity. Readers are encouraged to quote or reproduce material from this paper for their own use, but as copyright holder, CUTS requests due acknowledgement and a copy of the publication.

This Briefing Paper is researched and written by Mr. Pradeep S. Mehta and Mr. Ujwal Kumar and for CUTS Centre for International Trade, Economics & Environment CUTS Centre for International Trade, Economics & Environment, D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.20 7482, Fx: 91.141.20 7486, Email: cutsjpr@jp1.dot.net.in; cuts.jpr@cuts-india.org. Website: www.cuts-india.org and printed by Jaipur Printers (P) Ltd., M I Road, Jaipur 302 001 India